No. 9401.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

19

P. M. JACKSON, Trustee in Bankruptcy for the Estate of Leonard J. Woodruff, a bankrupt,

Appellant,

vs.

E. A. LYNCH, Receiver in Bankruptcy of the Estate of Leonard J. Woodruff, alleged bankrupt,

Appellee.

APPELLANT'S CLOSING BRIEF.

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APPELLANT'S CLOSING BRIEF.

In this, the closing brief of appellant, it becomes necessary to dwell at the outset upon appellee's "Statement of Facts," consisting of the first twelve pages of his twenty-nine page brief.

The factual situation as to the instant matter is set forth in appellant's opening brief and the matters underlying this appeal are set forth in the transcript of the record herein.

Appellee, however, begins his brief by concerning himself with another appeal before this court in which entirely different and other matters of fact and law are involved. Appellant herein will not involve this brief with any attempt to argue the facts or law of that other matter

for obvious reasons; including the reason that the time for filing briefs therein has passed and final briefs are on file.

Appellee has likewise, for example on page 2 of his brief, gone far beyond the record in stating in reference to Woodruff's voluntary petition in Oklahoma:

> "He filed his schedules in bankruptcy in Oklahoma and *did not* list his California properties." (Appellee's emphasis.)

This assertion by appellee is contrary to fact.

Considering further appellee's "Statement of Facts," it is to be noted that on page 2 it is asserted that

> "No receiver or trustee from Oklahoma appeared in California . . . until P. M. Jackson, Trustee, from Oklahoma, appeared in this proceeding with his motion to vacate for the first time on November 17, 1939. . . ."

Lest there be left unanswered any inference or implication from this statement that the trustee (appellant herein) was sitting idly by for months and neglecting his duties, it is but necessary again to refer to the record in this case.

After the adjudication in the voluntary proceeding in Oklahoma and *before* the appointment of Jackson as trustee therein, the petitioning creditor filed his petition in California on July 13, 1939. That petition presented to the California court on July 13, 1939, alleged [R. 8]:

> "That an emergency exists making it absolutely necessary for the appointment of a Receiver . . .

> to take charge of the assets of Leonard J. Woodruff, marshal said assets, preserve the same from loss and destruction or dissipation by the agents of Leonard J. Woodruff, insure the same, and hold the same. . . ."

Upon the qualification of Trustee Jackson in the Oklahoma matter, with an outstanding order by the California court in response to the above mentioned petition, Jackson was placed in an anomalous position in carrying out his duties as trustee for the reason that he could not act, without being in contempt of the California order, until the question was settled.

The assertion, in the face of these facts, is made by appellee on page 8 of his brief:

> "that Trustee P. M. Jackson is the official who left uninsured, uninventoried and unprotected, extensive properties of the bankrupt, real and personal, of a value in excess of $300,000.00, and all on the ground that they were not scheduled in the Oklahoma bankruptcy proceeding."

How, under these facts, appellee can now argue on his line of reasoning in support of his position is beyond understanding.

M. E. Heiser, the sole petitioning creditor in California, appeared and participated in the selection of the trustee in the Oklahoma proceedings wherein appellant herein was elected as trustee. That election was July 20, 1939. [R. 17.]

However, prior to July 20, 1939, and on July 13, 1939, said M. E. Heiser, alone, filed his petition as a creditor in the District Court of the United States, in and for the Southern District of California [R. 3], and procured the appointment of E. A. Lynch as receiver, one week prior to the appointment of P. M. Jackson in Oklahoma. No application was made by Heiser to the Oklohama court for the appointment of a receiver or for ancillary proceedings. E. A. Lynch proceeded to take charge of and insure the bankrupt's property in California before P. M. Jackson was ever appointed, and appellee's argument as to Jackson's alleged inaction in this respect approaches the error of a vicious circle that is more vicious than circular.

The Oklahoma court, without question, assumed jurisdiction on July 5, 1939, and thereafter duly and regularly appointed its trustee, which party is directly responsible to that court for his conduct with respect to the estate.

At this juncture it is necessary to bear in mind that the adjudication on July 5, 1939, in Oklahoma has stood and is at present a valid and uncontroverted judgment, adjudicating Leonard J. Woodruff a bankrupt. No appeal has been taken by any party from that adjudication; nor has any supersedeas bond been filed with respect to the appeal from the order of October 16, 1939. [R. 40 to 42.]

The appeal that is pending before the United States Circuit Court of Appeals for the Tenth Circuit is from the order of the District Court of the United States, in and for the Eastern District of Oklahoma, dated October 16, 1939 [R. 40, 41 and 42], under General Order No. 6 and

from an order of the Oklahoma court denying Heiser's motion to dismiss the proceedings there. This circumstance is a vital fact to be borne in mind throughout the entire consideration of this matter. The question on appeal in the Tenth Circuit is not to determine which proceeding is primary and which is secondary, as is erroneously stated in appellee's brief at page 3. As said by Judge Cosgrave, based upon counsel's own plea in the lower court (App. Br. p. 10):

> "Mr. Lynch, the receiver in California, does not question the effectiveness of the decision of the Oklahoma court, since it was the first to acquire jurisdiction, but he insists that this court must settle his account. . . ." [R. 53.]

Once the Oklahoma court proceeded to judgment on July 5, 1939, it thereby exhausted all concurrent jurisdiction, and the California court had no jurisdiction of either the *res* or person on July 13, 1939, when the involuntary petition was filed in California.

Said M. E. Heiser has, by the proceeding initiated July 13, 1939, in California, attempted to interfere with the orderly processes of administration of the estate by the Oklahoma court, which court had placed *in custodia legis* all of the assets of Leonard J. Woodruff, wherever located, under Section 70, subdivision (c) of the Bankruptcy Act, and in practical effect the California court assumed possession of property then in constructive possession of the Oklahoma court.

The United States District Court for the Eastern District of Oklahoma proceeded, after notice to all parties in interest, to adjudge that that jurisdiction is the domicile of the bankrupt, that the majority of the creditors are there, the bankrupt owns extensive lands there, and that the proceeding there will suit the greatest convenience of the parties. [R. 40 and 41.]

These points are mentioned at the outset to emphasize the fact that appellee begins and proceeds with his brief by dealing with matters that are outside the issue involved in this appeal.

Here, the question is simply whether, under the circumstances, the District Court, in and for the Southern District of California, Central Division, was in error in entering the order of October 19, 1939, staying the transmittal of the records to the District Court for the Eastern District of Oklahoma [R. 40, 41 and 42] and in ordering the receiver, E. A. Lynch, and his attorneys to file their report, and preventing the appellant from taking possession of property belonging to the estate.

Before proceeding to comment upon the several subdivisions of appellee's brief, it is urged by appellant that one important factor be kept in the foreground. Appellee apparently has predicated his position upon the theory that the action of the California court following the filing of the petition by M. E. Heiser on July 13, 1939, resulted in an ancillary proceeding in California.

The Proceeding Is Not and Never Was Ancillary.

General Order No. 51 provides:

> "No ancillary receiver shall be appointed in any district court of the United States in any bankruptcy proceeding pending in any other district of the United States except (1) *upon the application of the primary receiver, or* (2) *upon the application of any party in interest with the consent of the primary receiver, or by leave of a judge of the court of original jurisdiction.* No application for the appointment of such ancillary receiver shall be granted unless the petition contains a detailed statement of the facts showing the necessity for such appointment, which petition shall be verified by the party in interest, or the primary receiver, or by an agent of the party in interest or primary receiver specifically authorized in writing for that purpose and having knowledge of the facts. Such authorization shall be attached to the petition." (Italics supplied.)

Appellant submits that as there was no compliance whatever with General Order No. 51, the whole fabric of appellee's argument falls by reason of that very fact.

The California proceedings were never started or maintained *in aid* of the Oklahoma proceedings, but assumed to be independent and separate proceedings and were in *conflict* with the proceedings in Oklahoma. The Bankruptcy Act, in providing for jurisdiction in ancillary proceedings, specifies in Section 2, subdivision 20, that they shall

> "exercise ancillary jurisdiction . . . *in aid* of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy." (Italics supplied.)

Attention is directed to the language of the creditor's petition in the California proceedings [R. 9] wherein it is alleged that a receiver need be appointed to take charge of and marshal the assets of Leonard J. Woodruff

> "and hold same until the adjudication and subsequent election of a Trustee in Bankruptcy herein. . . ."

In response to the said petition in California on July 13, 1939, an order appointing receiver was made by the California court containing the following:

> "It Is Ordered That E. A. Lynch of Los Angeles, California, be and he is hereby appointed Receiver of *all property of whatsoever nature and wheresoever located*, now owned by or in the possession of said bankrupt, and of all and any property of said bankrupt and in possession of any agent, servant, officer or representative of said bankrupt, care for, inventory, insure, segregate and move all assets of said bankrupt until the appointment and qualification of the Trustee herein." (Italics supplied.) [R. 12.]

The question of simultaneous proceedings in bankruptcy involving the same debtor is not necessarily an unusual one. Appellee herein has referred to "Remington on Bankruptcy" at pages 13, 14 and 15 of his brief dealing with the subject of jurisdiction.

We refer to the same authority, "A Treatise on the Bankruptcy Law of the United States," by Harold Remington, Fourth Edition Volume 1, 1934, beginning at page 447. At page 448 we find the following textual statement supported by authority:

> "The court making the first adjudication of bankruptcy retains jurisdiction over all proceedings therein

> until the same are closed and may stay the other proceedings."

See, also:

Hamilton Gas Co. v. Watters, 79 Fed. (2d) 438,

which involves appeals from the District Court of West Virginia. Reorganization of a Delaware corporation following petition of debtor corporation in New York, filed June 8, 1934, followed by decree on June 9, 1934, taking exclusive jurisdiction of debtor and its property, which gave that court the prior right to proceed despite the earlier petition filed by creditors on June 7, 1934, in West Virginia. Jurisdiction in New York, based upon the allegation that the principal place of business was there, while jurisdiction was asserted in West Virginia upon the allegation that the principal assets were in West Virginia. It was then held as to this conflict:

> ". . . that it was the intention of Congress to give preference, under such circumstances, to the jurisdiction selected by the corporation debtor rather than that chosen by the petitioning creditors; and that it is the priority of the adjudication not priority in the filing of the petition which determines the right of the court to retain jurisdiction as against another court in which a petition has also been filed."

It was later found as a fact that by reason of the principal place of business also being in West Virginia the proceedings in New York should be dismissed.

Before proceeding to discuss the several following headings of appellee's brief it is deemed to be important to point out appellee's failure to identify accurately his reference to "Remington on Bankruptcy." It is not possible to

determine which edition of that work he may have had before him by the references on pages 13, 14 and 15 of his brief. Examination of the 4th Edition of the work does not check with his citations.

Further, there are incorrect citations to reported cases in appellee's brief; for example, on page 14, *German v. Franklin* is cited 9 Sup. Ct. Rep. 159, 128 U. S. 52, 32 L. Ed. 519. The U. S. reference should be 526 instead of page 52.

Again, on page 28, *Loesser v. Dallas* (C. C. A. 2d. Cir.), 192 Fed. 909, is erroneously cited as being reported in Volume 102.

The cases themselves cited by appellee may be segregated into two general classifications; those treating of ancillary proceedings and the rights, duties and responsibilities of those acting in that capacity; and those cases dealing with other jurisdictional and related matters.

Under the first group of cases, it is submitted, as in this matter clearly appears that the proceedings in California were not ancillary, but in fact were in conflict with the Oklahoma proceedings.

Within the second group of appellee's cited cases are such cases as

Babbitt v. Dutcher, 216 U. S. 102,

cited on pages 16 and 18 of his brief. That case deals with the question of whether the corporate books relate to the property of the bankrupt to the extent that they may be seized by the trustee. That and similar cases are of no assistance in the present problem, which involves a conflict between two district courts for exclusive jurisdiction.

I.

Beginning at page 13 appellee advances a discussion that jurisdiction existed in California by reason of California being the alleged principal place of business and domicile of Woodruff.

There is no dispute upon the general propositions of law set forth by appellee in so far as those propositions apply to a set of facts where the bankrupt has his principal place of business in one jurisdiction and his domicile in another that he may be adjudicated in either, but no case holds that he may be adjudicated in both. The courts in each district have concurrent jurisdiction to start, but when one proceeds to judgment or assumes jurisdiction then the power of the other court is exhausted.

Appellant points out that the very foundation of appellee's argument is non-existent for the reason that the Oklahoma court has determined formally that it has jurisdiction by reason of Woodruff's domicile and principal place of business being in that jurisdiction, and the order of adjudication is a final judgment and not subject to a collateral attack. (See appellee's authorities, p. 14.)

Appellant respectfully refers to the authorities cited in his opening brief, pages 4 to 8, which deal with the character of the real question here involved, and to the California District Court's decision [R. 51] which clearly states the question involved.

Appellee under this part of his brief captions the succeeding discussion by an allusion to the alleged failure of the bankrupt to schedule certain property in the Oklahoma proceeding. That does not appear to be a jurisdictional question in any respect; the record in nowise supports such caption, nor is it a fact that the bankrupt so acted.

The trustee's title to property of the bankrupt does not depend on whether assets are scheduled, nor is there anything in the Act that the scheduling of assets affects the jurisdiction.

II.

On pages 16 and 17 of appellee's brief his argument proceeds upon two different hypothetical theories that the jurisdiction is either primary or ancillary. He apparently is unable to determine which of these assumed theories he should follow.

The answer is plain—the California "jurisdiction" was neither primary nor ancillary, in fact it did not exist.

As pointed out in appellant's opening brief, beginning at page 9, no ancillary proceedings were instituted under General Order No. 51, or otherwise. Again, this point is not in question in the present proceedings. The Bankruptcy Act of the United States and the general orders established by the Supreme Court provide specific, definite and orderly proceedings and steps in cases of ancillary proceedings to preclude the very anomaly that threatens in this matter by reason of two district courts attempting to assume jurisdiction of the same subject matter at the same time. Were such a situation possible, it is conceivable that a bankrupt, merely by reason of owning property in several jurisdictions, would find his estate subject to multiple proceedings all over the United States. That possibility and its consequent defeat of creditors' rights is the obvious reason for General Order No. 51 and Sections 2-a, subdivisions 20 and 69, subdivision c of the Bankruptcy Act. See record, page 54, where the order of the California court plainly states its jurisdiction is not ancillary.

III.

Beginning at page 18 appellee discusses generally a proposition of law that does not involve the facts of the case here at issue. Discussion is there indulged in by appellee concerning the rights of courts in *ancillary* proceedings.

Appellant is not controverting any assertions as to the powers of courts in true ancillary proceedings, but respectfully points to the obvious fact that the instant matter does not involve ancillary administration. As stated, the authorities cited by appellee do not apply to the facts of the instant matter.

IV.

Appellee, beginning on page 21, continues his discussion upon the theory that the instant matter arises out of ancillary administration.

By applying the very argument advanced by appellee at this point it is apparent that the Oklahoma court has jurisdiction of the estate to the exclusion of all other courts. Examination of the situation dealt with in

In re Continental Coal Corp., 238 Fed. 113

discloses a great similarity to the case here at issue and the holding is to the effect the court—such as the Oklahoma court in this matter—has such possession of the estate, as placed it in *custodia legis*. (See pages 4 to 8, appellant's opening brief.) Appellee apparently overlooks the fact that the possession of the property by the Oklahoma court may be actual or constructive, and no court, state or federal, may interfere.

Isaac v. Hobbs, 282 U. S. 734.

V.

At page 24 and following appellee further argues upon the theory of ancillary administration in California. Appellant again must advert to the fact that the argument of appellee is outside the point at issue. Under the circumstances of the instant matter, in order to proceed with ancillary administration compliance with General Order No. 51 would have to have been had, and the proceeding must be instituted *in aid of* and *not in conflict with* the Oklahoma administration.

Were that done, then there would be a wholly different situation here involved as to the power of the California court to fix the compensation of its appointee for services rendered in the interests of the estate. However, there was no such proceeding had, all of which is unequivocally supported by the record herein and even the order of the California court. [R. 54.]

VI.

In concluding the closing brief of appellant, it is respectfully pointed out that appellant's opening brief sets forth clearly and tersely the factual situation; deals with the legal propositions involved and states appellant's position.

Appellee has devoted practically all of his brief not by way of reply to a single case cited by appellant, but indulges in a discussion of law applying to other and different factual situations. Appellant fails to see the applicability of any of the points or cases advanced by appellee since they relate to ancillary proceedings and for that reason appellant is not analyzing in detail the cases cited by appellee.

In conclusion these following points are made for emphasis which, it is submitted, definitely support appellant's position that the orders appealed from should be set aside:

A. Voluntary petition filed in Oklahoma July 5, 1939.

1. Oklahoma court thereby acquired exclusive jurisdiction.
2. No ancillary proceedings were had at any time.
3. Jurisdiction of other courts of concurrent jurisdiction was thereupon exhausted.
4. No appeal taken from the Oklahoma adjudication of July 5, 1939.

B. Involuntary petition filed in California July 13, 1939, by a single petitioning creditor (M. E. Heiser), who had actual knowledge of the Oklahoma adjudication and, without applying to that court for ancillary proceedings, instituted an involuntary proceeding in California and in *conflict* with Oklahoma court, *not in aid thereof.*

C. Heiser, the California petitioning creditor, appeared in the Oklahoma proceeding and participated in the election of the trustee, appellant herein.

D. After hearing, upon notice to all interested parties, the Oklahoma court found and determined that the appointed trustee should assume and take exclusive possession of all property wherever situated, and that all future proceedings should be had in that court.

E. As in this brief hereinabove pointed out, the question here involved is the propriety of the action of the District Court of California staying the execution of the order of October 18, 1939 [R. 40, 41 and 42] of the Oklahoma court; and as to the propriety of the order of October 19, 1939 [R. 43 to 46 incl.] and of November 15, 1939 [R. 51 to 55 incl.] made by the California court.

There is yet another and eminently practical consideration applying to this case. The underlying theory of bankruptcy is to preserve the assets of the estate for the benefit of the creditors. To accomplish that equitable objective it is essential to minimize expenses and costs and above all to avoid duplication of expenses.

Should appellee's theory be upheld in the instant matter thereupon the precedent is established that following adjudication of a bankrupt that owns property or has places of business in many jurisdictions, instead of a single court administering the estate there could well be scores of receivers in every district where property might be situated all clamoring for compensation to the several courts of their appointment. Allowances could be made in many jurisdictions without regard to the statutory limitations on receiver and trustee compensation.

(Sec. 48 of the Bankruptcy Act as amended.)

Representative attorneys from many jurisdictions might converge upon the court of adjudication (to ascertain the amount of insurance to be carried), all of which

would melt the estate away to the vanishing point. Such a situation is unthinkable.

In the instant matter the appellee has no cause for complaint because the existing circumstances are entirely the result of one court and its agents endeavoring to take property already in *custodia legis* of another court.

It is finally urged, upon the record herein, and upon the authorities cited by appellant here and in his opening brief that the orders appealed from be set aside to the end that the administration of the estate of the bankrupt may be carried on in an orderly fashion by the court having exclusive jurisdiction thereof, namely, the District Court of the United States for the Eastern District of Oklahoma.

Respectfully submitted,

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Attorney for Appellant.